Supreme Court, U.S.
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No. 08-686

IN THE

Supreme Court of the United States

PAUL BOSCHETTO, PETITIONER

v.

JEFFREY D. HANSING; FRANK-BOUCHER CHRYSLER DODGE-JEEP; GORDIE BOUCHER FORD; BOUCHER AUTOMOTIVE GROUP

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the sale of an item through an internet auction site such as eBay provides the requisite "minimum contacts" to support personal jurisdiction over a non-resident defendant in the buyer's forum state?

2. Whether "purposeful availment" can be found utilizing the "effects test" enunciated in *Calder v. Jones*, 465 U.S. 783 (1984) to confer jurisdiction over the seller of merchandise through an Internet auction site, such as eBay, where it is alleged that the seller committed a tortious act in the forum state arising from the transaction?

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is dated August 20, 2008 and is a published decision.

The order of the United States District Court, for the Northern District of California is dated July 17, 2006 and is a published decision.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

The Ninth Circuit's opinion was rendered on August 20, 2008.

RELEVANT PROVISIONS INVOLVED

Federal Rule of Civil Procedure 12(b)(2).

> (b) How presented. Every defense, in law or fact, to a claim for relief in any pleadings, whether a claim, counterclaim, cross-claim, or third party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:
>
> . . .
>
> (2)lack of jurisdiction over the person...

STATEMENT

This lawsuit was filed to recover damages arising out of a fraudulent sale of an automobile on eBay. On February 26, 2006, Petitioner Paul Boschetto filed a Complaint for Damages containing the following causes of action: Consumer Legal Remedies Act [Calif.Civ.C. Section 1750, et. seq], Breach of Contract, Misrepresentation and Fraud. Said complaint was filed in the United States District Court, Northern District of California.

The crux of this lawsuit is that Respondents advertised and eventually sold a vehicle to Petitioner on eBay which was not as represented. Petitioner is a resident of the State of California; Respondents are residents of the State of Wisconsin.

eBay (www.ebay.com) and eBay Motors (www.motors.ebay.com) are well known internet auction sites where people can buy and sell merchandise. In this particular case, Respondent Jeffrey Hansing, an employee of Respondent Frank Boucher Chrysler Dodge Jeep, Gordie Boucher Ford and Boucher Automotive Group (hereinafter "Dealership") advertised a 1964 Ford Galaxie as a classic car item on eBay Motors.

Hansing advertised the subject vehicle as a 500 XL 427/425 hp "R Code" in awesome condition, not restored, rust free, chrome in excellent condition, recently rebuilt and ready to be driven. Based upon this advertisement, Petitioner bid for the subject vehicle and was notified on August 8, 2005 that his was

the winning bid. Petitioner paid Respondent Hansing a total of $34,106 for the vehicle.

Arrangements were made for Petitioner to have the vehicle picked up from Respondent Dealership. The vehicle was shipped from Dealership to Petitioner in San Francisco, California. Upon arrival, Petitioner discovered that the vehicle was not as represented in many respects. Petitioner sought to return the vehicle in exchange for the amount paid, but Respondent Hansing refused.

Hansing and Dealership each filed separate motions to dismiss for lack of personal jurisdiction. Petitioner opposed both motions on substantive grounds, and alternatively requested the district court issue an order allowing limited discovery on the issue of jurisdiction.

On July 17, 2006, the district court issued it's order and judgment dismissing the complaint against all defendants and denying Petitioner's request to conduct the requested jurisdictional discovery. In granting the motions to dismiss, Hon. Vaughn Walker held, *inter alia*, that this transaction was a "one shot affair" and that exercising personal jurisdiction would be improper because "Hansing's actions were not purposefully directed at the forum state." The district court further found that "auction sales on eBay are 'random' and 'attenuated.' App. 32a-33a.

The district court also denied Petitioner's request for limited discovery on the issue of jurisdiction.

Petitioner appealed the district court's ruling to the Ninth Circuit Court of Appeals. The Ninth Circuit affirmed the district court's ruling, holding that Petitioner could not establish "purposeful availment" by virtue of this eBay transaction. App. 8a The Court of Appeal additionally held that the district court did not err in denying Boschetto the requested discovery. App. 13a.

The Ninth Circuit's decision was filed on August 20, 2008.

REASONS FOR GRANTING THE PETITION

This case falls within the parameters of Supreme Court Rule 10(c) in that the Ninth Circuit Court of Appeals has decided an important question of federal law, jurisdiction, that has not been, but should be settled by this Court. With the ever increasing use of the internet as a means for not only businesses, but individuals, to sell their wares over an ever expanding geographic area, the issue of jurisdiction over these transactions is becoming increasingly important to ensure that the "traditional notions of fair play and substantial justice" are not abrogated by this country's technological advances.

I. REVIEW IS WARRANTED BECAUSE THIS CASE PRESENTS AN IMPORTANT QUESTION OF THE STANDARDS FOR PERSONAL JURISDICTION IN CASES INVOLVING TRANSACTIONS OVER THE INTERNET

A. *The Issue Decided By The Ninth Circuit Is An Important Question That Should Be Directly Settled By This Court*

This Court has issued numerous decisions over the years on the issue of personal jurisdiction. Due process considerations require that a defendant have sufficient "minimum contacts" with the forum state so as to not offend traditional notions of fair play and substantial justice. *International Shoe Co. v. Washington*, 326 U.S. 310, 316; *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475 (1985).

This Court established a three prong test for determining whether specific personal jurisdiction is proper. First, the defendant must have sufficient minimum contacts with the forum state. Second, the claim asserted against the defendant must arise out of those contacts. Finally, the exercise of jurisdiction must be reasonable. *Burger King, supra*, at page 475.

The first prong, which is the crux of the case before this Court, presents an issue of due process. In evaluating "minimum contacts," this Court has developed the "purposeful availment" test. "Purposeful availment" translates into a finding that the defendant's contacts with the forum state are not random, fortuitous or attenuated. As stated in *Burger King*,

supra, at page 475 "there must be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

This court went on to state in *Burger King* that "jurisdiction is proper, however, where contacts proximately result from actions by the defendant *himself* that create a 'substantial connection' with the forum state."
Id. at p. 475.

"As technological progress has increased the flow of commerce between States, the need for jurisdiction has undergone a similar increase." *Hanson v. Denckla*, 357 U.S. 235, 250-251 (1958). With emergence of the Internet, which has opened up the marketplace not only to businesses, but to individuals, a standard is needed which balances not only the constitutional protections for the sellers of the merchandise, but of the buyers as well.

It is accepted that physical presence in the forum state is not required to confer jurisdiction. "The soliciting of insurance by mail, the transmission of radio broadcasts into a state, and the sending of magazines and newspapers into a state to be sold there by independent contractors are all accomplished with the physical presence of an agent; yet all have been held to constitute the transaction of business in a state." *Compuserve, Incorporated v. Patterson*, 89 F.3d 1257, 1264 (6th Cir. 1996).

Petitioner submits that sales facilitated by an Internet auction site, such as eBay, are really no

different than soliciting sales in other forums via newspaper, mass mailings, or other similar media. The crux of the inquiry is whether the defendant seller intended that the solicitation reach residents of other states. The fact that fact that the seller who places an item up for auction has no say in who is ultimately the highest bidder does not detract from the fact that the seller intentionally placed the item for sale in the first place. The purpose of a site like eBay is to reach the widest possible audience; the seller knows that he or she may be consummating a transaction in another jurisdiction, but *knowingly* places the item on eBay in order to obtain the highest possible price.

As such, a seller of merchandise over the Internet "should not be permitted to take advantage of modern technology through an Internet Web page and forum and simultaneously escape traditional notions of jurisdiction." *EDIAS Software International, LLC v. BASIS International, Ltd.*, 947 F. Supp. 413, 420 (Ariz. 1996).

1. *Purposeful Availment and The "Effects Test" Enunciated in Calder v. Jones*

This court has also developed the "effects test" set forth in *Calder v. Jones*, 465 U.S. 783 (1984). This test requires a showing by the plaintiff that defendant committed an intentional act which was expressly aimed at the forum state (or someone within the forum state) and caused harm.

The Tenth Circuit recently analyzed the "effects test" in deciding the issue of jurisdiction in a case involving the termination of an auction on eBay. While

not specifically addressing the issues of sales over eBay, the application of the "effects test" by the court in *Dudnikov v. Chalk*, 514 F.3d 1063, 1072 (10th Cir. 2008) is significant.

Other courts have utilized the *Calder* test to find jurisdiction. The Florida court of appeal found that a personal jurisdiction was proper over a defendant who sold a vehicle to plaintiff through eBay, and misrepresented to the buyer the quality, value and condition of the vehicle. Relying, in part, on the *Calder* test, the court held that jurisdiction was proper since the plaintiff plead that defendant committed a tort within the State of Florida. *Fletcher Jones West Shara v. Rotta*, 919 So.2d 685 (Fla.App. 3 Dist. 2006). *See also McGuire v. Lavoie*, (N.D. Tex. 2003) Action No. 3:03-CV-0161BH (holding that "when the actual content of communications with a forum gives rise to an intentional tort cause of action, this alone constitutes purposeful availment" citing *Wein Air Alaska, Inc. v. Brandt*, 195 F.3d 208, 213 (5th Cir. 1999)).

In a similar vein, it has been held that purposefully directing spam to Internet users, without knowledge of where they reside, is sufficient to confer personal jurisdiction. *Verizon Online Services v. Ralsky*, 203 F.Supp. 2d 601, 611, 610 (E.D. Va. 2002); *Internet Doorway, Inc. v. Parks*, 138 F.Supp. 2d 773, 779-780 (S.D. Miss. 2001). *See also, ALS Scan, Inc. v. Digital Service Consultants, Inc.*, 293 F.3d 707, 714 (4th Cir. 2002)(holding that a state may exercise personal jurisdiction over a defendant who electronically directs activity towards a state with the intent of engaging in business or other interactions there and the activity creates a cognizable cause of action).

Other courts, facing similar factual scenarios, have ruled the personal jurisdiction is improper. *See Marschke v. Wratislaw*, 743 N.W.2d 402 (S.D. 2007); *Ginsburg v. Dinicola*, (Mass.6-7-2007) Action No. 06-11509RWZ.

In the instant action, Boschetto has alleged, in part, that Hansing committed fraud and misrepresentation in selling the subject vehicle to him via the eBay auction. Analysis of the issue of "purposeful availment" using the principles enunciated in *Calder* and discussed in other cases, was lacking in the court of appeal's decision. The Ninth Circuit acknowledged in it's opinion that it evaluated the "purposeful availment" analysis using the contract cases, not tort cases such as *Calder v. Jones*. App. 7a. Like those cases dealing with issues of misrepresentation or fraud, once Hansing was aware that Boschetto resided in California, and consummated the fraudulent transaction, he availed himself of the forum state of California and could and should be expected to be haled into court there to defend his conduct.

2. *Development of the sliding scale analysis developed in the Zippo case*

One of the first cases to deal with the issue of personal jurisdiction in an internet transaction was *Zippo Mfg. Co. v. Zippo DOT Com*, 952 F.Supp. 1119 (D. Pa. 1997). The *Zippo* court created a 'sliding scale' rule based on the type of internet site through which the transaction was made. As noted by the court there,

> "...the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed jurisdictional principles."

Zippo, supra at p. 1124.

The *Zippo* court went on to define this sliding scale. On one end are the situations where the defendant clearly conducts business on an ongoing basis. In that situation, jurisdiction is proper. On the opposite end of the spectrum is the defendant who maintains a website for informational purposes only, with no interactivity. This type of website is not sufficient to confer personal jurisdiction.

"The middle ground is occupied by interactive web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the web site. [citation]." *Zippo, supra,* at p. 1124.

The Ninth Circuit in this case acknowledged that a transaction through eBay falls within this middle ground in that eBay is an "interactive" web site. App. 10a. The court, however, goes on to hold that this "one shot affair" was insufficient to confer personal jurisdiction.

Federal and State appellate courts across the land have developed variant views on personal

jurisdiction in internet transaction cases following the *Zippo* sliding scale analysis.

The New York Supreme Court has noted that

> "for Internet consumer fraud claims, the Internet medium is essentially irrelevant, for the focus is primarily upon the location of the messenger and whether the messenger delivered what was purchased. In some cases, it might be necessary to analyze the location of certain other business operations, such as the site used or the place orders were received."

People v. Lipsitz, 663 N.Y.S.2d 468, 473-474 (Sup.Ct. N.Y. Cty. 1997).

The district court in Massachusetts summarized the arguments made by Boschetto in the instant action, when it declared:

> "On the one hand, it troubles me to force corporations that do business over the Internet...to now factor in the potential costs of defending against litigation in each and every state...On the other hand, it is also troublesome to allow those who conduct business on the Web to insulate themselves against jurisdiction in every state, except in the state (if any) where they are physically located."

Digital Equip. Corp. v. AltaVista Technology, Inc., 960 F.Supp. 456, 471 (D. Mass. 1997).

As stated in *Gorman v. Ameritrade Holding Corp.*, 293 F.3d 506, 510-511,

> "Just as our traditional notions of personal jurisdiction have proven adaptable to other changes in the national economy, so too are they adaptable to the transformation wrought the by the Internet. In the last century, for example, courts held that, depending upon the circumstances, transactions by mail and telephone could be the basis for personal jurisdiction notwithstanding the defendant's lack of physical presence in the forum. There is no logical reason why the same should not be true of transactions accomplished through the use of e-mail or interactive websites. Indeed, the application of this precedent is quite natural since much communication over the internet is still transmitted by ordinary telephone lines."

The differing views of personal jurisdiction, as determined by ever increasing transactions over the Internet generally, and over auction sites like eBay, specifically, require a definitive rule of the applicable constitutional guidelines established by this Court. The evolution of technology has resulted in an evolving standard of reasonableness, commensurate with "contemporary notions of due process." *Burnham v. Superior Court*, 495 U.S. 604, 630.

As the Massachusetts court recognized in *Digital Equip. Corp., supra*, it would be patently unreasonable and unfair to allow a seller, like Hansing, to take advantage of modern technology in advertising his vehicle to residents of every state in this nation, selling

his vehicle to a California resident knowing that the buyer is in California, and then turn around and invoke rules of jurisdiction which as applied to the facts at hand to not comport with "contemporary notions of due process. *Burnham, supra.*

CONCLUSION

For all of the foregoing reasons, petitioner respectfully requests that the Supreme Court grant review of this matter.

Respectfully submitted,

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(any footnotes trail end of each document)

No. 06-16595

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PAUL BOSCHETTO,
Plaintiff-Appellant,

v.

JEFFREY D. HANSING; FRANK-BOUCHER CHRYSLER DODGE-JEEP; GORDIE BOUCHER FORD; BOUCHER AUTOMOTIVE GROUP,
Defendants-Appellees.

May 14, 2008, Argued and Submitted, San Francisco, California

August 20, 2008, Filed

JUDGES: Before: Betty B. Fletcher and Pamela Ann Rymer, Circuit Judges, and Kevin Thomas Duffy, * District Judge. Opinion by Judge B. Fletcher; Concurrence by Judge Rymer.

OPINION BY: Betty B. Fletcher

OPINION

B. FLETCHER, Circuit Judge:

This appeal presents a question that remains surprisingly unanswered by the circuit courts: Does the sale of an item via the eBay Internet auction site provide sufficient "minimum contacts" to support

personal jurisdiction over a nonresident defendant in the buyer's forum state? Plaintiff-Appellant Paul Boschetto ("Boschetto") was the winning bidder for a 1964 Ford Galaxie sold on eBay by the Defendant-Appellee, Jeffrey Hansing ("Hansing") for $ 34,106. Boschetto arranged for the car to be shipped from Wisconsin to California, but upon arrival it failed to meet his expectations or the advertised description. Boschetto sued in federal court; his complaint was dismissed for lack of personal jurisdiction. We now affirm.

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Boschetto lives in San Francisco, California.[1] Defendant-Appellee Jeffrey D. Hansing resides in Milton, Wisconsin. *Id.* Defendants-Appellees Frank-Boucher Chrysler Dodge-Jeep, Gordie Boucher Ford and Boucher Automotive Group ("Boucher Defendants") are private corporations with their principal places of business in Wisconsin. The Boucher Defendants operate a website that advertises their auto dealerships, although it is not alleged that this website was connected in any way with the transaction at issue in this case. Hansing is an employee of one of the Boucher Defendants, Frank Boucher Chrysler Dodge-Jeep. The complaint avers that on August 1, 2005, all Defendants "owned and advertised [ ] a 1964 Ford Galaxie 500 XL 427/425 hp 'R Code' in awesome condition, not restored, rust free chrome in excellent condition, recently rebuilt and ready to be driven, with clear title, and a vehicle warranty number of 4E68R149127."

The car was advertised for sale on the eBay Internet auction site; a copy of a portion of the eBay listing was attached to Boschetto's complaint. *Id.* The eBay listing indicated that the item was located in Janesville, Wisconsin. Boschetto bid $ 34,106 for the Galaxie on August 8, 2005, and was notified through eBay that same day that he was the winning bidder. *Id.* Boschetto and Hansing communicated via email to arrange for delivery of the vehicle from Wisconsin to California. Boschetto ultimately hired a transport company to pick up the car in Wisconsin; it arrived in California on September 15, 2005. *Id.*

Upon delivery, Boschetto discovered that the car was not an "R Code" as advertised, and noted a variety of other problems, including a motor that would not turn over, rust, and extensive dents on the body of the vehicle. *Id.* Boschetto contacted eBay and Hansing in an attempt to rescind the purchase, but those efforts failed. *Id.* He filed a complaint in United States District Court, Northern District of California on February 23, 2006. Boschetto alleged four state law causes of action (violation of the California Consumer Protection Act; breach of contract; misrepresentation; and fraud), and pled jurisdiction pursuant to the federal diversity statute, 28 U.S.C. § 1332(a).

All Defendants moved to dismiss based on lack of personal jurisdiction. On July 13, 2006, the district court granted the motion. The district court reasoned that the lone jurisdiction-ally relevant contact with California, an eBay sale consummated with a California purchaser, was insufficient to establish jurisdiction over any of the Defendants. Although Hansing used eBay to market the automobile, the district court observed that

"eBay acted not as a 'distribution center' but rather as a virtual forum for the exchange of goods," and that in a standard eBay transaction--like the one at issue in this appeal--the item goes to whomever is the highest bidder, and so "the eBay seller does not purposefully avail himself of the privilege of doing business in a forum state absent some additional conduct directed at the forum state." *Id.*

The district court also rejected Boschetto's request to conduct additional discovery relevant to jurisdiction. *Id.* Noting its "broad discretion" to permit or deny such discovery, the court found that Boschetto's request for further discovery was premised on "speculat[ion] without any support" that the additional discovery would yield jurisdictionally relevant information. *Id.* Judgment was entered on July 17, 2006 and this timely appeal followed.

II. PERSONAL JURISDICTION

We review a dismissal for lack of personal jurisdiction *de novo*. *See Myers v. Bennett Law Offices*, 238 F.3d 1068, 1071 (9th Cir. 2001). In opposition to a defendant's motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that jurisdiction is proper. *See Sher v. Johnson*, 911 F.2d 1357, 1361 (9th Cir. 1990). If the district court decides the motion without an evidentiary hearing, which is the case here, then "the plaintiff need only make a prima facie showing of the jurisdictional facts." *Id.* (citation omitted). Absent an evidentiary hearing this court "only inquire[s] into whether [the plaintiff's] pleadings and affidavits make a prima facie showing of personal jurisdiction." *Caruth v. Int'l Psychoanalytical Ass'n*, 59

F.3d 126, 127-28 (9th Cir. 1995). Uncontroverted allegations in the plaintiff's complaint must be taken as true. *See AT&T*, 94 F.3d at 588. "Conflicts between the parties over statements contained in affidavits must be resolved in the plaintiff's favor." *Schwarzenegger v. Fred Martin Co.*, 374 F.3d 797, 800 (9th Cir. 2004).

When no federal statute governs personal jurisdiction, the district court applies the law of the forum state. *See Panavision Int'l L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998). California's long-arm statute is co-extensive with federal standards, so a federal court may exercise personal jurisdiction if doing so comports with federal constitutional due process. *Id.* at 1320. "For a court to exercise personal jurisdiction over a nonresident defendant, that defendant must have at least 'minimum contacts' with the relevant forum such that the exercise of jurisdiction 'does not offend traditional notions of fair play and substantial justice.'" *Schwarzenegger*, 374 F.3d at 801 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 2d 95 (1945)). There are two forms of personal jurisdiction that a forum state may exercise over a nonresident defendant--general jurisdiction and specific jurisdiction. We deal here only with the latter.[2]

A. The district court correctly dismissed Boschetto's complaint for lack of personal jurisdiction.

We apply a three-part test to determine whether the exercise of specific jurisdiction over a nonresident defendant is appropriate:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform (some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) the claim must be one which arises out of or relates to the defendant's forum-related activities; and
>
> (3) the exercise of jurisdiction must comport with fair play and substantial justice, i.e. it must be reasonable.

Id. at 802 (citing *Lake v. Lake*, 817 F.2d 1416, 1421 (9th Cir. 1987)). The plaintiff bears the burden on the first two prongs. *Id.* If the plaintiff establishes both prongs one and two, the defendant must come forward with a "compelling case" that the exercise of jurisdiction would not be reasonable. *Id.* (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)). But if the plaintiff fails at the first step, the jurisdictional inquiry ends and the case must be dismissed. *See Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006) ("[Plaintiff's] arguments fail under the first prong. Accordingly, we need not address [the remaining two prongs].").

For part one of this three-part test, we have typically analyzed cases that sound primarily in contract--as Boschetto's case does--under a "purposeful availment" standard. *Schwarzenegger*, 374 F.3d at 802 ("We often use the phrase 'purposeful availment' in shorthand

fashion, to include both purposeful availment and purposeful direction, but availment and direction are, in fact, two distinct concepts. A purposeful availment analysis is most often used in suits sounding in contract.") (internal citation omitted); *see also McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 817 (9th Cir. 1988) (distinguishing purposeful direction precedents where "personal jurisdiction is sought on a contract claim, not on a tort claim"). To have purposefully availed itself of the privilege of doing business in the forum, a defendant must have "performed some type of affirmative conduct which allows or promotes the transaction of business within the forum state." *Sher*, 911 F.2d at 1362 (internal quotation marks and citation omitted). Our evaluation of the jurisdictional significance of a defendant's contract or other business in the forum is not rigid and formalistic, but rather practical and pragmatic. *Burger King Corp.*, 471 U.S. at 478 ("[W]e have emphasized the need for a highly realistic approach that recognizes that contract is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction.") (internal quotation marks and citation omitted); *Lake*, 817 F.2d at 1421 ("The first step of the specific jurisdiction analysis involves a *qualitative* evaluation of the defendant's contact with the forum state.") (emphasis added). In doing so, we are guided by the Supreme Court's admonition that the formation of a contract with a nonresident defendant is not, standing alone, sufficient to create jurisdiction. *Burger King Corp.*, 471 U.S. at 478 ("If the question is whether an individual's contract with an out-of-state party *alone* can automatically establish sufficient minimum contacts in the other party's home forum, we

believe the answer clearly is that it cannot.") (emphasis in original); *see also McGlinchy*, 845 F.2d at 816 n.9 (same).

Here, Boschetto fails at step one of the test for specific jurisdiction, as the lone transaction for the sale of one item does not establish that the Defendants purposefully availed themselves of the privilege of doing business in California. The arrangement between Boschetto and Hansing which is, at bottom, a contract for the sale of a good, is insufficient to have created a substantial connection with California. Hansing (and assuming *arguendo* that they had any involvement in the transaction, the Boucher Defendants) did not create any ongoing obligations with Boschetto in California; once the car was sold the parties were to go their separate ways. Neither Boschetto's complaint nor his affidavit in opposition to dismissal point to any continuing commitments assumed by the Defendants under the contract. *Id.* Nor did performance of the contract require the Defendants to engage in any substantial business in California. On Boschetto's version of the facts, funds were sent to Wisconsin and arrangements were made to pick up the car there and have it delivered to California. This was, as the district court observed, a "one-shot affair." *See Compuserve, Inc. v. Patterson*, 89 F.3d 1257, 1265 (6th Cir. 1996)). As the Supreme Court has expressly cautioned, a contract alone does not automatically establish minimum contacts in the plaintiff's home forum. *See Burger King Corp.*, 471 U.S. at 478; *see also Doe v. Unocal Corp.*, 248 F.3d 915, 924 (9th Cir. 2001) ("However, an individual's contract with an out-of-state party alone [cannot] automatically establish sufficient minimum contacts to support personal jurisdiction.") (internal quotation

marks and citations omitted); *cf. Travelers Health Ass'n v. Commonwealth of Va*, 339 U.S. 643, 647, 70 S. Ct. 927, 94 L. Ed. 1154 (1950) (purposeful availment found if "business activities reach out beyond one state and create *continuing relationships and obligations*") (emphasis added).[3]

Ignoring the limited nature of the transaction at issue, Boschetto attaches special significance to the fact that the transaction was consummated via eBay, noting that the eBay listing could have been viewed by anyone in California (or any other state for that matter) with Internet access. But the fact that eBay was used as the conduit for this sale does not affect the jurisdictional outcome, at least not on the particular facts presented here.

In *Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir. 1997), we discussed with approval a sliding scale analysis that looks to how interactive an Internet website is for purposes of determining its jurisdictional effect. ("In sum, the common thread, well stated by the district court in *Zippo*, is that the 'likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of the commercial activity that an entity conducts over the Internet.'") (quoting *Zippo Mfg. Co. v. Zippo Dot Com*, 952 F. Supp. 1119, 1124 (W.D. Pa. 1997)). The plaintiff in *Cybersell* relied on the fact that the defendant operated a website, accessible in the forum state, that contained allegedly infringing trademarks. 130 F.3d at 416. The defendant's website advertised its services but did not allow parties to transact business via the site. *Id.* at 419. Noting the lack of interactivity on the defendant's website, the court concluded that the defendant had

"done no act and [ ] consummated no transaction, nor has it performed any act by which it purposefully availed itself of the privilege of conducting activities, in Arizona, thereby invoking the benefits and protections of Arizona law." *Id.*

The *Cybersell* analysis, while persuasive where the contact under consideration is the website itself, is largely inapplicable in this case. Here, eBay was used to create a listing for the sale of a good. Based on a superficial application of *Cybersell*, the eBay listing process and the sale it engenders is "interactive." *Id.* (noting the lack of evidence suggesting that defendant's website resulted in any business generation). But, as the district court noted, "the issue is not whether the court has personal jurisdiction over the intermediary eBay but whether it has personal jurisdiction over an individual who conducted business over eBay." In *Cybersell* and related cases where the Internet site actually belongs to and is operated by the defendant, the nature of the website has jurisdictional significance because the website allows the defendant to maintain some ongoing contact with the forum state (as well as every other state that can access the site). *See Zippo*, 952 F. Supp. at 1125-26 ("We are being asked to determine whether Dot Com's conducting of electronic commerce with Pennsylvania residents constitutes the purposeful availment of doing business in Pennsylvania."). Here, the eBay listing was not part of broader e-commerce activity; the listing temporarily advertised a good for sale and that listing closed once the item was sold, thereby extinguishing the Internet contact for this transaction within the forum state (and every other forum).[4]

Moreover, Boschetto does not allege that any of the Defendants are using eBay to conduct business generally. He does not allege that Defendants conduct regular sales in California (or anywhere else) via eBay. Based on his own affidavit he named the Boucher Defendants based on a "good faith belief" that Hansing may have been acting as their agent during the sale. But he does not go on to allege--on information and belief or otherwise--that either Hansing or the Boucher Defendants are regular users of the eBay sales platform to sell their cars.[5]

This is a distinction with a difference, as the cases that have found that jurisdiction was proper based on eBay sales relied heavily on the fact that the defendant was using the platform as a broader vehicle for commercial activity. *See, e.g., Crummey v. Morgan*, 965 So.2d 497, 500 (Ct. App. La. 2007) (evidence of two prior sales to Louisiana residents in prior year); *Dedvukaj v. Maloney*, 447 F. Supp. 2d 813, 822-23 (E.D. Mich. 2006) ("Although the Court's research has not disclosed any personal jurisdiction cases involving the use of eBay auctions as a commercial seller's primary marketing vehicle, it is clear from the record that Defendants' use of eBay is regular and systemic."); *Malcolm v. Esposito, 63 Va.* Cir. 440, 2003 WL 23272406 at *4 (Va. Cir. Ct. Dec. 12, 2003) ("Defendants are commercial sellers of automobiles who, at the time the BMW was sold, were represented on eBay as 'power sellers' with 213 transactions.").

At bottom, the consummation of the sale via eBay here is a distraction from the core issue: This was a one-time contract for the sale of a good that involved the forum state only because that is where the purchaser

happened to reside, but otherwise created no "substantial connection" or ongoing obligations there. *See McGee*, 355 U.S. at 223. The Supreme Court has, in the past, sounded a note of caution that traditional jurisdictional analyses are not upended simply because a case involves technological developments that make it easier for parties to reach across state lines. *World-Wide Volkswagen*, 444 U.S. at 293 ("[W]e have never accepted the proposition that state lines are irrelevant for jurisdictional purposes, nor could we, and remain faithful to the principles of interstate federalism embodied in the Constitution.").

The use of eBay no doubt made it far easier to reach a California buyer, but the ease with which Boschetto was contacted does not determine whether the nature and quality of the Defendants' contacts serve to support jurisdiction. That is not to say that the use of eBay digs a virtual moat around the defendant, fending off jurisdiction in all cases. Where eBay is used as a means for establishing regular business with a remote forum such that a finding of personal jurisdiction comports with "traditional notions of fair play and substantial justice," *International Shoe Co.*, 326 U.S. at 316, then a defendant's use of eBay may be properly taken into account for purposes of establishing personal jurisdiction. *See Crummey*, 965 So.2d at 500; *Dedvukaj*, 447 F. Supp. 2d at 822-23; *Malcolm*, 63 Va. Cir. 440, 2003 WL 23272406 at *4. But on the facts of this case--a one-time transaction--the use of eBay as the conduit for that transaction does not have any dispositive effect on jurisdiction.[6]

B. The district court did not abuse its discretion by denying Boschetto's request for jurisdictional discovery.

A district court's decision to permit or deny jurisdictional discovery is reviewed for abuse of discretion. *See Data Disc, Inc. v. Systems Tech. Assoc., Inc.*, 557 F.2d 1280, 1285 n.1 (9th Cir. 1977). The district court's refusal to provide such discovery, "will not be reversed except upon the clearest showing that denial of discovery results in actual and substantial prejudice to the complaining litigant. Discovery may be appropriately granted where pertinent facts bearing on the question of jurisdiction are controverted or where a more satisfactory showing of the facts is necessary." *Id.* (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430 n.24 (9th Cir. 1977)).

The district court did not abuse its discretion by denying Boschetto's request for jurisdictional discovery. Boschetto does not allege that the Boucher Defendants' dealership website is used to conduct sales, merely that it can be viewed by potential customers. Moreover, Boschetto does not allege that any of the Defendants made any other eBay sales or posted listings either before or after the initiation of the lawsuit. While it might be jurisdictionally relevant if Hansing or the Boucher Defendants had used eBay to conduct a significant quantity of automobile sales to California residents or in other states, neither Boschetto's complaint nor his affidavit allege that any of the Defendants are engaged in such sales. The denial of Boschetto's request for discovery, which was based on little more than a hunch that it might yield jurisdictionally relevant facts, was not an abuse of

discretion. *See Butcher's Union Local No. 498 v. SDC Inv., Inc.*, 788 F.2d 535, 540 (9th Cir. 1986) (holding that district court did not abuse its discretion by refusing jurisdictional discovery where the plaintiffs "state only that they 'believe' discovery will enable them to demonstrate sufficient California business contacts to establish the court's personal jurisdiction").

III. CONCLUSION

The sale of one automobile via the eBay website, without more, does not provide sufficient "minimum contacts" to establish jurisdiction over a nonresident defendant in the forum state. Likewise, given the total absence of any evidence or allegations that the conduct here involved more than just this one sale, the district court did not abuse its discretion by refusing to allow jurisdictional discovery.

AFFIRMED.

Footnote

*The Honorable Kevin Thomas Duffy, Senior United States District Judge for the Southern District of New York, sitting by designation.

1The summary of facts is taken from Boschetto's complaint and his affidavit filed in opposition to the motion to dismiss. For purposes of determining whether the court has personal jurisdiction over Defendants, the court assumes Boschetto's allegations are true. *See AT&T v. Compagnie Bruxelles Lambert*, 94 F.3d 586, 588 (9th Cir. 1996).

2The district court summarily, and correctly, rejected Boschetto's contention that the Defendants could be subject to general jurisdiction in California. Boschetto does not challenge that aspect of the district court's dismissal order on appeal.

3In *Burger King* the Court noted that even a "single act" by the defendant can support jurisdiction, but only if that act creates a "substantial connection" with the forum. 471 U.S. at 476 n.18 (quoting *McGee v. Int'l Life Ins. Co.*, 355 U.S. 220, 223, 78 S. Ct. 199, 2 L. Ed. 2d 223) (1957)). The Court's reliance on *McGee* is, however, telling. In *McGee*, the record suggested there was only one contract between the defendant and any California resident. 355 U.S. at 222. But the Court did not decide the jurisdictional issue on a quantitative assessment of the number of contracts the defendant had entered into in the forum state; rather, it looked to the content or qualitative nature of the contract before it, and reasoned that the contract gave rise to ongoing obligations that connected the defendant with the forum state. *Id.* at 223. Applied here, it is not the fact that Defendants may have entered into only one contract with a California resident that is dispositive. Rather, it is the fact that the nature of the contract entered into did not create any "substantial connection" between Boschetto and the Defendants beyond the contract itself. *Id.* ("It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with that State.").

4Under a traditional jurisdictional analysis, advertising in a forum state does not typically suffice to establish personal jurisdiction. *See Wood v. Santa Barbara Chamber of Commerce*, 705 F.2d 1515, 1522 (9th Cir.

1983); *Holland America Line, Inc. v. Wartsila North America, Inc.*, 485 F.3d 450, 460 (9th Cir. 2007).

5It is for this reason that Boschetto's reliance on *Stomp, Inc. v. NeatO LLC*, 61 F.Supp.2d 1074 (C.D. Cal. 1999) is misplaced. In *Stomp,* the defendant used its own website as a portal for on-line sales, and the defendant consummated at least a "small" number of sales in the forum state. *Id.* at 1078. 6We note that our affirmance of the district court's dismissal is in-line with a number of state court decisions that have addressed whether personal jurisdiction can be established by way of a single eBay transaction with a forum plaintiff. *See e.g., Sayeedi v. Wasler*, 15 Misc. 3d 621, 628, 835 N.Y.S.2d 840, 2007 WL 623521 (N.Y. Civ. Ct. 2007) ("No evidence was provided by Plaintiff as to Defendant's overall eBay statistics, experience, or any marketing directed at potential customers, designed for instance, to welcome bids from New Yorkers or any other acts that indicate Defendant may be purposely availing himself specifically to the business of New Yorkers or any desire to take advantage of New York law."); *Gossett v. HBL, LLC*, 2006 U.S. Dist. LEXIS 30435, 2006 WL 1328757 at *2 (D.S.C. 2006 May 11, 2006) ("[Defendant's] mere listing on eBay is not enough to invoke jurisdiction in South Carolina."); *Karstetter v. Voss*, 184 S.W.3d 396, 405 (Tex. App. 2006) ("There was no evidence that appellees traveled to Kansas or engaged in other transactions with appellant or other Kansas residents either through the eBay service or otherwise."); *Metcalf v. Lawson*, 148 N.H. 35, 802 A.2d 1221, 1227 (N.H. 2002) ("Finally, what appears to be the isolated nature of this transaction and the absence of any evidence that the defendant was a commercial seller militate against a finding of

jurisdiction.").
CONCUR

RYMER, Circuit Judge, concurring:

I agree that jurisdiction is lacking. I write separately to underscore my disagreement with Boschetto's argument that Hansing, as a seller on eBay, necessarily availed himself of the privilege of doing business in each state across the nation. I believe that a defendant does not establish minimum contacts nationwide by listing an item for sale on eBay; rather, he must do "something more," such as individually targeting residents of a particular state, to be haled into another jurisdiction.

The basic principles are well settled. Personal jurisdiction is proper if it is consistent with the forum state's long-arm statutes and if it comports with due process of law. *Fireman's Fund Ins. Co. v. Nat'l Bank of Coops.*, 103 F.3d 888, 893 (9th Cir. 1996). California's long-arm statute extends the exercise of personal jurisdiction to the limits of due process. *Harris Rutsky & Co. Ins. Servs., Inc. v. Bell & Clements Ltd.*, 328 F.3d 1122, 1129 (9th Cir. 2003) (citing Cal. Code Civ. Pro. § 410.10). For due process to be satisfied, a defendant must have "minimum contacts" with the forum state such that the assertion of jurisdiction "does not offend traditional notions of fair play and substantial justice." *Pebble Beach Co. v. Caddy*, 453 F.3d 1151, 1155 (9th Cir. 2006) (citing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 315, 66 S. Ct. 154, 90 L. Ed. 95 (1945)).

This circuit applies a three-part test to determine whether a plaintiff has demonstrated sufficient

minimum contacts to establish specific jurisdiction over a defendant. Minimum contacts are found where:

(1) the defendant has performed some act or consummated some transaction within the forum or otherwise purposefully availed himself of the privileges of conducting activities in the forum, (2) the claim arises out of or results from the defendant's forum related activities, and (3) the exercise of jurisdiction is reasonable.*Id.* at 1155 (citing *Bancroft & Masters, Inc. v. Augusta Nat'l Inc.*, 223 F.3d 1082, 1086 (9th Cir. 2000)). The plaintiff bears the burden of satisfying the first two prongs of the test, and the defendant bears the burden on the third. *Id.* Boschetto falls short on the first prong.

The "purposeful availment" requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of "random," "fortuitous," or "attenuated" contacts. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475-76, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985) (citations omitted). We have refined this to mean that the defendant must either have "purposefully availed" himself of the privilege of conducting activities in the forum, thus invoking the benefits and protections of its laws, or have "purposefully directed" his activities toward the forum. *Schwarzenegger v. Fred Martin Motor Co.*, 374 F.3d 797, 807 (9th Cir. 2004).

A defendant "purposefully avails" himself of a forum when he acts in a way that creates a "substantial connection" with the state, *Burger King*, 471 U.S. at 475, *see also Kulko v. California Superior Court*, 436 U.S. 84, 94, n.7, 98 S. Ct. 1690, 56 L. Ed. 2d 132 (1978), as where he deliberately engages in significant

activities there, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 781, 104 S. Ct. 1473, 79 L. Ed. 2d 790 (1984), or creates "continuing obligations" between himself and its residents. *Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 648, 70 S. Ct. 927, 94 L. Ed. 1154 (1950). In return for taking advantage of the forum state's "benefits and protections," the defendant must submit to the burden of being sued there. *Burger King*, 471 U.S. at 475-76.

A defendant "purposefully directs" activity at a forum state when he: (1) commits an intentional act, that is (2) expressly aimed at the forum state, and that (3) causes harm that he knows is likely to be suffered in that jurisdiction. *See Schwarzenegger*, 374 F.3d at 803 (citing *Calder v. Jones*, 465 U.S. 783, 104 S. Ct. 1482, 79 L. Ed. 2d 804 (1984)). Under this "effects test," it is not sufficient that the defendant took action with a foreseeable effect in the forum state. *Id.* at 804-05. He must do "something more" for courts to conclude that he "expressly aimed" activity at the forum, such as individually targeting its residents. *Id.* at 805; *Pebble Beach* Co., 453 F.3d at 1157.

In my view, Hansing did not purposefully avail himself of California. Hansing created no continuing obligations to California residents by selling his car on eBay. His only obligation was to complete the sale with the highest bidder, whoever and wherever he might be, which Hansing fulfilled by allowing Boschetto to retrieve the car in Janesville, Wisconsin. Nor did Hansing's eBay auction establish a substantial connection between himself and California such that he invoked the benefits and protections of its laws. There is no suggestion that he is engaged in ongoing business activities there,[1] and though a Californian ultimately

made the highest of fifty bids, this was a fortuity; Boschetto does not argue either that Hansing had any control over the high bidder's location within the United States, or that the high bidder's residence had any effect on Hansing's obligations, given Hansing's requirement that the high bidder either pick up the car in Wisconsin or, as Boschetto did, arrange for a third-party to ship it somewhere else. *World-Wide Volkswagen Corp.*, 444 U.S. 286, 297-99, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980) ("the foreseeability that is critical to [the] due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.") (citations omitted).

I also do not think that Hansing purposefully directed any activity at California. Boschetto argues that Hansing directed his eBay auction at the state by failing to bar Californians from bidding. By accepting bids from all states, he contends, Hansing offered to sell the subject vehicle to residents of each state of the union, including California. I disagree that allowing eBay users throughout the United States and Canada to bid on an auction subjects the seller to nationwide jurisdiction. As we have previously held, merely advertising over the Internet is not sufficient to confer jurisdiction throughout the United States, even though the advertisement or website at issue may be viewed nationwide. *Pebble Beach Co.*, 453 F.3d at 1157-58; *Cybersell*, Inc, 130 F.3d at 419-20.[2] The defendant must do "something more" to aim activity expressly at a state, *Cybersell*, 130 F.3d at 418, 419; Pebble Beach Co., 453 F.3d at 1156-57,[3] and Boschetto has not shown

either that Hansing tailored his auction to the residents of any state in particular, or that he sent or advertised his auction to any state in particular, much less California.[4] Arguably, Hansing could foresee that California residents would bid on his auction, and that he would benefit from their participation, but foreseeable participation by Californians is not enough. Hansing must have done something more to aim his auction expressly at the state, such as individually targeting California residents.[5] *Pebble Beach Co.*, 453 F.3d at 1157. On the facts of this case, he did nothing more. He simply permitted those with eBay access throughout the United States and Canada to bid on his car, agreeing to let the winner retrieve it in Janesville, Wisconsin.

Accordingly, although Hansing listed his car for sale in an unrestricted eBay auction, allowing residents of all states to view the auction and bid, and though he ultimately sold the car to a California resident, he neither availed himself of the privilege of doing business in California nor purposefully directed any activity at the state.[6]

I agree that the district court did not abuse its discretion by denying Boschetto jurisdictional discovery. Where, as here, a plaintiff's claim of personal jurisdiction is both attenuated and based on bare allegations rebutted by specific denials made by the defendants, the district court need not permit even limited discovery. *Pebble Beach Co.*, 453 F.3d at 1160.

Footnotes

1There is no basis for concluding that Hansing is engaged in extensive business activity on the Internet, with California or any other forum. *See Cybersell, Inc. v. Cybersell, Inc.*, 130 F.3d 414, 419-20 (9th Cir. 1997). Although Boschetto points to *Stomp, Inc. v. NeatO, LLC*, 61 F.Supp.2d 1074, 1077 (C.D. Cal. 1999), I do not accept its suggestion that conducting any business over the Internet subjects a defendant to suit nationwide.

2Boschetto argues that Hansing should not be allowed to take advantage of modern technology while simultaneously escaping traditional notions of jurisdiction. However, we rejected this precise argument in *Cybersell*. 130 F.3d at 419. Haling Hansing into California would be inconsistent with traditional notions of jurisdiction. In any event, I am not persuaded by Boschetto's characterization of Hansing's use of the Internet to sell his car as "taking advantage." Allowing sellers to hold nationally available auctions without requiring them to submit to jurisdiction nationwide is beneficial to buyers as well. A less-burdensome jurisdictional rule encourages sellers to hold auctions in the first place, thereby creating opportunities for buyers to find items they want and to decide for themselves whether -- taking all relevant matters into account -- they want to place a bid.

3*See also Rio Properties, Inc. v. Rio Int 'l Interlink*, 284 F.3d 1007, 1020 (9th Cir. 2000) (no jurisdiction based on passive website without "something more"); *Panavision Int'l, L.P. v. Toeppen*, 141 F.3d 1316, 1320 (9th Cir. 1998) (posting website on internet does not establish jurisdiction nationwide); and *Schwarzenegger*, 374 F.3d at 806-07 (foreseeable effect of Ohio print advertisement in California did not render

advertisement "expressly aimed" at California); *cf. Bancroft*, 223 F.3d at 1084 (letter to domain registrar, which interfered with plaintiff's use of registered domain, independently targeted plaintiff); and *Metropolitan Life Ins. Co. v. Neaves*, 912 F.2d 1062, 1065 (9th Cir. 1990) (fraudulent letter sent to plaintiff in forum state was express aiming).

4Even if Hansing knew Boschetto was in California when he sent the post-auction email, the email was not sufficient to subject him to personal jurisdiction there. It established only a limited contact, and Hansing sent it because Boschetto won the auction, not because he was in California. *See Burger King Corp.*, 471 U.S. at 474.

5Nor did Hansing purposefully avail himself of the benefits and protections of California by allowing Californians to bid. His auction did not create a substantial connection with the forum, and nothing in the record indicates that it made any difference to Hansing where the winning bidder resided (within the United States or Canada) or where he took the car when it left Wisconsin. *World-Wide Volkswagen*, 444 U.S. at 295-97 (no jurisdiction over auto distributor based on customer's decision to drive to the forum state).

6This is consistent with the approach of the majority of courts to address whether listing an item for nationwide sale on eBay requires a seller to submit to suit nationwide. *See e.g. Winfield Collection, Ltd. v. McCauley*, 105 F.Supp.2d 746, 749 (E.D. Mich. 2000) (eBay sales are random and attenuated); *Metcalf v. Lawson*, 148 N.H. 35, 802 A.2d 1221, 1226 (N.H. 2002)

(seller had no control over ultimate winner); *Karstetter v. Voss*, 184 S.W.3d 396, 405 (Tex. Ct. App. 2006) (contact with Kansas was random, isolated and fortuitous); *Action Tapes, Inc. v. Ebert*, 2006 U.S. Dist. LEXIS 4958 (N.D. Tex. 2006) (eBay sellers do not control interactivity of eBay site); *United Cutlery Corp. v. NFZ, Inc.*, 2003 U.S. Dist. LEXIS 21664 (D. Md. 2003) (intent was to sell to highest bidder, irrespective of location); *Gossett v. HBL, LLC*, 2006 U.S. Dist. LEXIS 30435, 2006 WL 1328757, *2 (D.S.C. 2006) ("mere listing on eBay is not enough to invoke jurisdiction . . . ."); and *Sayeedi v. Walser*, 15 Misc. 3d 621, 2007 WL 623521 (N.Y.C. Civ. Ct. 2007) (ultimate destination of eBay item completely determined by bidders).

No C-06-1390 VRW

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

PAUL BOSCHETTO,
Plaintiff,

v

JEFFREY D HANSING, FRANK BOUCHER
CHRYSLER DODGE-JEEP, GORDIE BOUCHER
FORD and BOUCHER AUTOMOTIVE GROUP,
Defendants.

July 17, 2006, Filed

JUDGMENT IN A CIVIL CASE

IT IS ORDERED AND ADJUDGED that pursuant to the court's order Jeffrey Hansing and the Wisconsin dealerships' motions to dismiss, judgment is entered for the defendants.

No C-06-1390 VRW

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA

PAUL BOSCHETTO,
Plaintiff,

v

JEFFREY D HANSING, FRANK BOUCHER
CHRYSLER DODGE-JEEP, GORDIE BOUCHER
FORD and BOUCHER AUTOMOTIVE GROUP,
Defendants.

July 13, 2006, Filed

JUDGES: VAUGHN R WALKER, United States District Chief Judge.

ORDER

The complaint alleges a scenario that as far as the court can discern has been little dealt with in the published case law but which is bound to recur, perhaps with some frequency, in the years ahead. Plaintiff Paul Boschetto, a California resident, brought this diversity action against Wisconsin resident Jeffrey D Hansing and various Wisconsin car dealerships, Doc # 1 (Compl), ¶¶ 1-4, alleging, inter alia, that Hansing committed breach of contract and fraud by selling plaintiff a defective 1964 Ford Galaxie in an Internet auction on eBay.com. Hansing and the Wisconsin dealerships have separately moved to dismiss this case under FRCP

12(b)(2) for lack of personal jurisdiction. Doc ## 4, 9. For the reasons stated below, the court GRANTS both motions.

I

On August 1, 2005, plaintiff alleges that Hansing posted a 1964 Ford Galaxie for auction on eBay.com and that Hansing advertised the car as an "R Code" in "awesome condition," "recently rebuilt" and "ready to be driven." Compl, ¶ 6. Plaintiff contends that he relied on this description when submitting a bid of $ 34,106 and that eBay later notified him that his bid had succeeded. Id, ¶¶ 7, 8. After plaintiff paid for the car, Hansing instructed him by email that he could pick it up from Frank Boucher Chrysler Dodge Jeep, the Wisconsin dealership where Hansing worked. Id, ¶¶ 5, 10. Frank Boucher Chrysler Dodge Jeep and the other defendant dealerships apparently constitute a single automotive group. Doc # 9-2, ¶ 2. Plaintiff hired a delivery company to transport the vehicle to California and received it on September 15, 2005. Compl, ¶¶ 11-12. Plaintiff then discovered that the vehicle was defective and was not an "R Code" as advertised. Id, ¶ 12.

II

A plaintiff has the burden of establishing that the court has personal jurisdiction over a defendant. *Doe v Unocal Corp*, 248 F.3d 915, 922 (9th Cir 2001). In assessing a plaintiff's showing, the court may consider evidence presented in affidavits and other evidence procured during discovery. But when the court acts on the motion without holding an evidentiary hearing, as here, the plaintiff need only make a prima facie showing

of jurisdictional facts to withstand the motion to dismiss. Id. When not directly controverted, plaintiff's version of the facts must be taken as true and conflicts between the facts contained in the parties' affidavits should be resolved in favor of plaintiff. Id. The facts here are not in material dispute.

A federal court may exercise personal jurisdiction over a defendant when such jurisdiction comports with the law of the state in which the court sits and with the requirements of due process. *Lee v City of Los Angeles*, 250 F.3d 668, 692 (9th Cir 2001). "California [law] permits the exercise of personal jurisdiction to the full extent permitted by due process." *Bancroft & Masters, Inc.. v. Augusta Nat'l, Inc..*, 223 F.3d 1082, 1086 (9th Cir 2000); Cal Code Civ Pro § 410.10. Due process requires a defendant to have certain minimum contacts with the forum state so that permitting the suit would not offend "traditional notions of fair play and substantial justice." *Int'l Shoe Co v Washington*, 326 U.S. 310, 316, 66 S. Ct. 154, 90 L. Ed. 95 (1945) (quoting *Milliken v Meyer*, 311 U.S. 457, 463, 61 S. Ct. 339, 85 L. Ed. 278 (1940)) (internal quotation marks omitted). A defendant's "conduct and connection with the forum state" must be such that the defendant "should reasonably anticipate being haled into court there." *World-Wide Volkswagen v Woodson*, 444 U.S. 286, 297, 100 S. Ct. 559, 62 L. Ed. 2d 490 (1980).

General jurisdiction is a type of personal jurisdiction that exists when a defendant has substantial or continuous and systematic contacts with the forum state. *Bancroft & Masters*, 223 F.3d at 1086. When such contacts exist, a defendant may be haled into court in that state "in any action, even if the action is unrelated

to those contacts." Id. The standard for establishing general jurisdiction is "'fairly high,' and requires that the defendant's contacts be of the sort that approximate physical presence." Id (quoting *Brand v Menlove Dodge*, 796 F.2d 1070, 1073 (9th Cir 1986)) (citation omitted).

Absent general jurisdiction, a court still may exercise specific jurisdiction. The Ninth Circuit has established a three-prong test for establishing specific jurisdiction:

> (1) The non-resident defendant must purposefully direct his activities or consummate some transaction with the forum or resident thereof; or perform some act by which he purposefully avails himself of the privilege of conducting activities in the forum, thereby invoking the benefits and protections of its laws;
>
> (2) [T]he claim must be one which arises out of or relates to the defendant's forum related activities; and
>
> (3) [T]he exercise of jurisdiction must comport with fair play and substantial justice, ie it must be reasonable.

Schwarzenegger v Fred Martin Motor Co., 374 F.3d 797, 802 (9th Cir 2003). Although plaintiff bears the burden of establishing the first two prongs, defendant bears the burden on the third prong. See id.

A

Plaintiff argues the court may have general jurisdiction

over Hansing if discovery shows that he previously sold other cars to California residents. Doc # 17-1 at 5. Although plaintiff does not contest the Wisconsin dealerships' assertions that they are not incorporated in California and have never sold an automobile there (Doc # 9-2, ¶¶ 4, 11), he nonetheless suggests that the dealerships' website might be sufficient to establish general jurisdiction over them. Doc # 16-1 at 6.

Plaintiff's general jurisdiction arguments fail to persuade. Plaintiff admits that he "has no direct knowledge" whether either the Dealership or Hansing have 'continuing or systematic' contacts with the State of California." Id. Even if plaintiff could demonstrate past sales by Hansing to California, occasional sales to California residents are insufficient to create general jurisdiction. See *Brand*, 796 F.2d at 1073. And plaintiff has not marshaled any evidence to contest the Wisconsin dealerships' assertion that they have never conducted any business in California via their website. Doc # 9-2, ¶ 11. Accordingly, plaintiff has not satisfied the fairly high burden for establishing general jurisdiction.

B

Plaintiff's better argument, of course, is that the court may exercise specific jurisdiction over Hansing because he contracted to sell a car to a California resident. Doc # 17-1 at 6. Further, plaintiff asserts that Hansing acted as the Wisconsin dealerships' agent and employee in selling the car, thereby permitting the court to exercise jurisdiction over them. Doc # 16-1 at 8; Compl, ¶ 5. Hansing's actions form the only asserted basis for exercising specific jurisdiction over the Wisconsin

dealerships. This argument need not long detain us. Even if Hansing acted as an agent, which the dealerships dispute, he did not as will presently be explained, purposefully direct his actions toward California. Without that showing, the court cannot exercise jurisdiction over the Wisconsin dealerships.

Plaintiff argues that the Ninth Circuit's decision in *Data Disc, Inc. v Sys. Tech. Assocs.*, 557 F.2d 1280 (9th Cir 1977), militates in favor of finding personal jurisdiction over Hansing. Doc # 17-1 at 6. But *Data Disc* is hardly instructive here. In that case, the court found personal jurisdiction because "at least some of the negotiations took place at the Data Disc plant in Sunnyvale, California * * *." *Id.* at 1284. To the contrary here, negotiations in this case took place only over the Internet and never physically occurred in California.

The parties do not indicate, nor has the court discovered, any California or Ninth Circuit case law addressing the propriety of exercising specific jurisdiction over a nonresident defendant based on a single online auction sale to a resident of the forum state. But generally, "the likelihood that personal jurisdiction can be constitutionally exercised [over an entity with a website] is directly proportionate to the nature and quality of commercial activity that [the] entity conducts over the Internet." *Cybersell, Inc. v Cybersell, Inc.*, 130 F.3d 414, 419 (9th Cir 1997) (quoting *Zippo Mfg. Co. v Zippo Dot Com, Inc.*, 952 F. Supp. 1119, 1124 (WD Pa 1997)). This activity ranges from "a broad spectrum of Internet use on the one hand, and contacts with the forum on the other." *Id.* at 417. Here, of course, the issue is not whether the court has personal jurisdiction over the intermediary eBay but

whether it has personal jurisdiction over an individual who conducted business over eBay. Nonetheless, *Cybersell* provides a useful framework for determining whether Hansing's use of eBay constitutes sufficient minimum contacts with California to justify exercising personal jurisdiction.

In defining whether the defendant had sufficient minimum "contacts with the forum," *Cybersell* relies on *CompuServe, Inc. v Patterson*, 89 F.3d 1257 (6th Cir 1996). There, the Sixth Circuit found jurisdiction over defendant Patterson proper because he "electronically transmitted thirty-two master software files to CompuServe, which CompuServe stored and displayed to its subscribers. * * * In effect, Patterson used CompuServe as a distribution center to market his software." *Cybersell*, 130 F.3d at 417 (summarizing *CompuServe*, 89 F.3d at 1264). Additionally, the relationship "was intended to be ongoing in nature; it was not a 'one-shot affair.'" *Compuserve*, 89 F.3d at 1265.

In the present case, Hansing's contacts with the forum state are not nearly as repetitive or comprehensive as were Patterson's contacts in *Compuserve*. Although Hansing used eBay to market the automobile, eBay acted not as a "distribution center" but rather as a virtual forum for the exchange of goods. And the relationship between plaintiff and Hansing was exactly a "one-shot affair." While eBay is headquartered in California, this contact is irrelevant because this dispute only involves two eBay users and not eBay itself.

Exercising personal jurisdiction would be improper

here because Hansing's actions were not purposefully directed at the forum state. Auction sales on eBay are "random" and "attenuated," and "the choice of [the] highest bidder is * * * beyond the control of the seller;" hence, an overwhelming majority of courts have held that an eBay seller does not purposefully avail himself of the privilege of doing business in a forum state absent some additional conduct directed at the forum state. See *Winfield Collection, Ltd. v McCauley*, 105 F. Supp. 2d 746, 749 (ED Mich 2000); *Metcalf v Lawson*, 148 N.H. 35, 802 A.2d 1221 (NH 2002) (finding no personal jurisdiction over an eBay seller with no control over the ultimate winner and no ability to exclude buyers from specific jurisdictions); *Karstetter v Voss*, 184 S.W.3d 396 (Tex Ct App 2006) (finding no personal jurisdiction over an eBay seller who rejected a buyer's offer to preempt the auction and instead let the bidding process conclude), *Action Tapes, Inc. v Ebert*, 2006 U.S. Dist. LEXIS 4958 (ND Tex 2006) (finding no personal jurisdiction over an eBay seller where the traditional auction process was not altered or circumvented in any manner); *United Cutlery Corp. v NFZ, Inc.*, 2003 U.S. Dist. LEXIS 21664 (D Md 2003) (finding no personal jurisdiction over an eBay seller whose manifested intent was to sell to the highest bidder).

Although research did indicate two opinions that diverge from the prevailing view, their analyses do not persuade the court. In *Malcolm v Esposito*, the dispute arose from a single eBay sale to a Virginia resident. 2003 Va. Cir. LEXIS 257, 63 Va Cir 440, 446 (Va Cir Ct 2003). Nonetheless, the court found jurisdiction proper because defendants were commercial sellers with 213 sales on eBay and who represented that they had local,

national and international eBay customers. Id.

This case is distinguishable because plaintiff does not allege that Hansing or the Wisconsin dealerships conducted business over eBay with any frequency. To the contrary, plaintiff marshaled no evidence to contest the dealerships' assertion that they have never conducted business in California via the Internet. Doc # 9-2, ¶ 11.

In *Tindall v One 1973 Ford Mustang*, the dispute again arose from a single eBay sale. 2006 U.S. Dist. LEXIS 29621, 2006 WL 1329168, *1 (ED Mich 2006). The court found jurisdiction proper because in "selling the car to a Michigan resident, Defendants have transacted business in the state, giving this Court personal jurisdiction over them * * *." 2006 U.S. Dist. LEXIS 29621, [WL] at *4.

While more factually analogous to this case, *Tindall* is not persuasive because the court provided no reasoning to support its aforementioned conclusion. While other courts at least recognize that the Internet and particularly an eBay transaction may alter the jurisdictional analysis, the *Tindall* court seemingly analogized the situation to a "phone call or written correspondence to the forum." Id (quoting *GMC v Ignacio Lopez de Arriortua*, 948 F. Supp. 656, 663 (ED Mich 1996)). The analogy is flawed because phone calls and written correspondence by nature must be specifically targeted to a resident of the forum, while an advertisement on eBay lacks such focus.

Looking to whether Hansing engaged in some additional conduct directed at the forum, the court finds

that plaintiff has alleged none. Only after the auction and alleged fraud had been committed did Hansing learn that the car was California-bound and did he email plaintiff regarding delivery. Accordingly, the "nature and quality" of Hansing's conduct over the Internet are insufficient to permit exercising personal jurisdiction in California. Significantly, plaintiff -- not Hansing -- made the arrangements for pick-up of the vehicle in Wisconsin and dispatched the shipper to that state. Unlike the usual eBay transaction in which the seller arranges for shipment and sets in motion the events that land the product in the buyer's locale, this case is different.

This fact alone, although important enough, does not warrant finding that the court lacks personal jurisdiction over Hansing. Perhaps a greater significance lies in what too easy a test of personal jurisdiction could do to Internet commerce of the kind involved here. Assume an eBay seller would be subject to personal jurisdiction simply by consigning an item to eBay that is bought by some denizen of a faraway forum. The friction on e-commerce of such a rule would slow the flow of transactions -- perhaps significantly. No doubt, Boschetto suffers considerable inconvenience in going to Wisconsin to assert his claim. But he bought the car knowing it was in Wisconsin and chose to do so without an inspection by himself or a third party who could have been engaged for that purpose. Under the facts here, due process suffers no offense by holding that this court lacks personal jurisdiction over defendants.

C

Plaintiff alternatively requests that "limited discovery be allowed to determine whether Hansing had sufficient contacts to form the basis for jurisdiction" (Doc # 17-1 at 7-8) and "to determine whether Hansing was acting as either the actual or ostensible agent for [the] dealership" (Doc # 16-1 at 9). The court has broad discretion to permit or deny discovery to determine whether personal jurisdiction exists. See *Data Disc*, 557 F.2d at 1285 n1. Here, plaintiff merely speculates without any support that discovery might allow him to demonstrate that jurisdiction in California is proper. The court therefore DENIES plaintiff's request for discovery.

III

Accordingly, the court GRANTS Hansing's motion to dismiss (Doc # 4) and the Wisconsin dealerships' motion to dismiss (Doc # 9). The clerk is DIRECTED to CLOSE the file and TERMINATE all pending motions.

IT IS SO ORDERED.

VAUGHN R WALKER

United States District Chief Judge